

December 6th, 1758.

Unto the Right Honourable the Lords of Council and Session,

Nide Answers
No 40th Vol. 10th T H E

P E T I T I O N

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41.

JAMES HARDIE *junior* Merchant in *Kelso*,

Humbly sheweth,

THAT in Summer 1757, *George Liddle* Merchant in *Newcastle* purchased from the Petitioner, at different Times, a Quantity of Linen Yarn to the Value of upwards of 140 *l. Sterling*: That Mr. *Liddle* made different Payments to Account; but there is yet a Balance of about 18 *l. Sterling* unpaid. The Petitioner not being able to procure Payment of this Sum by fair Means, was obliged to have Recourse to the Law.

For this Purpose he applied to the Sheriff of *Roxburgh*, and obtained from him a Border Warrant, authorising him to arrest the Person of *George Liddle*, or failing of that, all Debts, Sums of Money, Goods or Gear, owing or belonging to him within the County, until he should find Caution *judicio fisci et judicatum solvi*. This Arrestment was accordingly executed in the Hands of three different Merchants in *Kelso* Debtors to *Liddle*. 21st Feb. 1758.

The Petitioner brought a Process before your Lordships against Mr. *Liddle*, for Payment of the above Balance, which Summons was duly executed at the Market Cross of *Edinburgh*, Pier and Shore of *Leith*, the Defender being out of the Kingdom. 24th Feb. 1758.

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dom. This Cause came in Course before Lord Nisbet, when Compearance was made for *George Liddle*; and it was pleaded for him, that as he was an *Englishman*, he was not amenable to the Courts of *Scotland*: That the Arrestment above-mentioned could not found a Jurisdiction to the Court of Session, as the Defender had not found Caution *judicio sisti et judicatum solvi*. His Lordship, upon the 25th of *July*, pronounced the following Interlocutor: "In respect the Defenders did
 " not find Caution, in consequence of the Arrestments used
 " against them, finds they are not subject to the Jurisdiction
 " of this Court; and therefore finds no Process; finds Expences
 " due, &c." Against this Interlocutor a Representation was presented, which his Lordship, upon the 22d *November* last, was pleased to refuse.

As the Petitioner is advised, that the Method he has taken to enforce Payment of the Debt due to him, is agreeable both to the Principles of Law, and to the universal Practice of the Country, he must beg Leave to lay the Case before the Court. The Question submitted to your Lordships is a simple Point of Law, not incumbered with any disputed Facts. Other Questions may possibly occur in the Course of the Cause; but *in hoc statu* it would be both improper and unnecessary to trouble your Lordships with taking Notice of any of them, because, until this preliminary Question be decided, there can be no Opportunity for their being pleaded.

The Question to be determined by your Lordships, is simply this: Mr. *Liddle* is Debitor to the Petitioner in 18 *l. Sterling*; the Petitioner arrests Debts due to Mr. *Liddle* to upwards of that Extent, to remain until he shall find Caution *judicio sisti et judicatum solvi*; Mr. *Liddle* does not find Caution; and the Question is, Can the Petitioner, when such Caution is not found, pursue Mr. *Liddle* before your Lordships for Payment of his Debt? Upon this the following Considerations are humbly submitted.



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It must be admitted, that a Foreigner, who has no Goods in *Scotland*, is by no Means amenable before our Courts ; but on the other hand the Petitioner apprehends, that every Foreigner, who has an Estate or any Goods in *Scotland*, is amenable before our Courts to that Extent, because every Man is supposed either to be present, or at least to have a Procurator to take Care of his Interest, wherever his Property is situated ; and as that Property is subject to the Courts of *Scotland*, he must appear to defend it when it is attacked, otherwise it will be carried off by the Claimant. This is evident in the Case of a Land Estate. Suppose an *Englishman*, who never was in *Scotland*, has an Estate lying in *Scotland*, in that Case every Process will be sustained against him in the same Way as if he lived upon the Spot, with this Difference only, that he must be summoned upon a greater Number of Days. One great Reason for this the Petitioner imagines is, that his Estate is fixed under your Lordships Jurisdiction ; and therefore whatever Judgment you shall give, it can easily be executed. When a Stranger has Moveables in *Scotland*, this does not of itself found a Jurisdiction, because they pass daily from Hand to Hand, and may in a few Hours be carried out of *Scotland*, by which your Lordships Decrees may be given to no Manner of Purpose. The Case however is different where these Moveables are arrested. This Diligence fixes them under your Lordships Jurisdiction, and they must there remain until the Event of the Process. The Petitioner therefore humbly apprehends, that such Arrestment subjects the Debtor to your Lordships Jurisdiction.

This Arrestment is well known in our Law by the particular Name of Arrestment *jurisdictionis fundandæ causa* ; this is a *nomen juris* frequently made Use of, and is the very Diligence used in the present Case : The Meaning of it, and which is also plainly indicated by its Name, is that the Pursuer, by arresting the Defender's Moveables, founds a Jurisdiction to the Judge

X Judge of the Territory, which he had not before. A Judge has no Jurisdiction over Strangers, who neither live within his Territory, nor have any Goods situated there; but so soon as any Goods belonging to the Debtor are fixed within his Territory, this gives the Judge a Jurisdiction over him. This is confirmed by the Authority of *Voet* in his Commentary, L. 2. T. 1. §. 46. his Words are *Exercetur jurisdictio in eos tantum qui sunt in territorio, vel ibi bona habent, sic ut vel persone vel bonorum intuitu subjeſti ſint*. The ſame has often been found by ſeveral Decisions obſerved in the Dictionary, *Tit. forum competens*, particularly December 1683, *Arnold contra Young*; in that Caſe the Court granted Warrant for an Arreſtment *jurisdictionis fundandæ cauſa*; it is evident therefore, that a Stranger, whoſe Goods are ſituated in *Scotland*, muſt be ſubject to your Lordſhips Jurisdiction to the Extent of theſe Goods. The Petitioner therefore hopes, your Lordſhips will be of Opinion, that the Arreſtments in queſtion ſubjects Mr. *Liddle* to your Lordſhips Jurisdiction, as Debts due to him are fixed by a legal Arreſtment within your Lordſhips Territory.

But ſuppoſing your Lordſhips ſhould entertain any Doubt that this is Law, it is at leaſt competent for the Petitioner to ſay to your Lordſhips, that Mr. *Liddle* owes him 18*l*. and that here is Money belonging to him in the Hands of the Arreſtees, and therefore to crave, that upon proving his Accompt, he may be allowed to attach theſe Moveables of Mr. *Liddle's* to the Extent of the Debt for Payment. Every Man is certainly entitled to lay hold of his Debtor's Effects wherever he can find them; in ſuch a Caſe, a regular Summons againſt the Debtor would not be neceſſary; but it would be
+ ſufficient if Notice were any how given him, that the Creditor was going to attach his Goods for the Debt, that if he had any Objections to make, he might appear in Court, and be heard for his Intereſt. In the preſent Caſe, the Petitioner ſays, that Mr. *Liddle* is Debtor to him in 18*l*. *Sterling*, that
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there is Money of his lying in the Hands of certain Merchants in *Kelfo*, and therefore he desires, that your Lordships, upon his proving his Accompt, will give him the Assistance of the Court to attach that Money for Payment of his Debt. Mr. *Liddle* has got sufficient Notice to defend against the Petitioner's Claim, and is accordingly in Court; if therefore, he has any Reason to offer why the Petitioner should not be allowed to lay hold of his Money for Payment, let him state it to your Lordships; and if he does not think proper to do that, the Petitioner is ready to prove his Accompt, and your Lordships will undoubtedly find him entitled to lay hold of the Money in question for Payment, if Mr. *Liddle* will not appear to demonstrate to your Lordships, that the Petitioner's Claim is groundless, as he pretends your Lordships will undoubtedly believe that it is well founded, and will give the Petitioner the Aid of the Court, to lay hold of what Subjects belonging to the Debtor he can find in *Scotland*, to the Extent of the Debt.

The Petitioner does not plead, that such a Decree would make the Debtor liable personally or universally for the Debt; all the Effect it can have is, to entitle him to lay hold of such Goods as he can find in *Scotland*; if these are not sufficient to pay the Debt, he must seek for the Residue in the best Manner he can. There is not however any Danger of this in the present Case, as there are Funds sufficient in the Hands of the Arrestees, to pay the whole Claim. The Defender insisted before the Lord Ordinary, that there was no Evidence that these Arrestees were due any thing to him, and therefore, that there was no Foundation upon which the Arrestment could be built; and that if it should turn out in the Event, that they had nothing in their Hands belonging to him, it would be certain, that he was by no Means subject to your Lordships Jurisdiction. This, however, is putting a Case which Mr. *Liddle* knows very well does not exist. It is very certain, that there is much more in the Hands of these Ar-

reftees, than is sufficient to answer the Claim in Question. Mr. *Liddle* puts imaginary Cases; but he has never ventured to deny, that they are Debtors to him to a much greater Extent than 18 l.

It was pleaded for the Defender before the Lord Ordinary, that the Custom of Arrestments upon Border Warrants, is old and obsolete, invented by our rude Ancestors, and only fit for Times of Barbarity, and intirely improper betwixt trading Nations, among whom Commerce is carried to a great Height.

X The Petitioner apprehends, that nothing is more common upon the Border than such Arrestments, to this Day; and it appears that such a Custom must have taken its Rise after Trade begun to take Place betwixt the two Kingdoms. Our rude Ancestors had little Intercourse with the *English*, except in the Way of Blows, and mutual Depredations: The Abolition of this Custom would be so far from being of Service to Trade, that it would entirely destroy it. No Man upon the Border would give Credit to one of the other Side, if he should be obliged to follow him to the Courts of the other Kingdom for Payment. Suppose an *English* Man owes a *Scots* Man the trifling Sum of 18 l. it would be better for him to make him a Present of it, than follow him to *Westminster-Hall* to operate his Payment.

2do, The Defender insisted, That in the Case of the Arrestment of one's Person, until he find Caution, that this did not found a Jurisdiction; but that if the Debtor thought proper to ly in Prison for 40 Years, that the Creditor has no Method of getting Payment; and from this he concludes that the same is the Case in an Arrestment of his Effects, and that if he thinks proper to allow them to remain under Arrestment, the Creditor can do nothing further. The Petitioner apprehends, that the Cases are not at all parallel. If he can get nothing to attach

each but the Person of his Debtor, Imprisonment is the only Diligence he can make Use of. The only Compulsitor he has upon the Debtor, is to force him *squalore carceris* to pay the Money ; and if he thinks proper to ly in Prison, nothing more can be done, because the Laws of this Country do not allow Creditors to expose the Persons of their Debtors to Sale for Payment. But the Case is very different when his Effects are arrested, because if the Debtor does not think proper to appear to defend against the Action, when properly warned, the Creditor can expose his Goods to Sale, or pursue a Furthcoming of the Debts due to him.

3tio, It was pleaded for the Defender, That though his Moveables in *Scotland* can be attached by his Creditors, yet that this cannot be done until their Debts be previously constituted. That, for this Purpose, a Decree must be taken against him before the Courts of *England*, and that it cannot be recovered here, unless he voluntarily subject himself to your Lordships Jurisdiction. The Petitioner begs Leave to be of a different Opinion. It is sufficient for him to say to your Lordships, that Mr. *Liddle* owes him 18 l. that he has sufficient Funds in *Scotland* for Payment, and therefore craves that your Lordships, upon being satisfied that this Claim is just, would give him your Assistance to lay hold of these Subjects for his Payment.

The Defender's Plea must appear before your Lordships with a very bad Grace. If the Claim is ill founded, let him appear and say so, and he cannot be afraid of meeting with Injustice from your Lordships. A Sentence of Absolvitor will free him from Trouble, and loose the Arrestment of his Money. But his Plea is of quite a different Nature. He will not enter the Lists to dispute the Justice of the Debt, but insists, that he is not amenable to the Courts of *Scotland*. Supposing your Lordships should find, that the Petitioner has brought a wrong Process against him, what could he possibly gain by such Decision ?

cision? There must certainly be some Way by which his Money can be attached for Payment of the Petitioner's Debt; and he may believe, that he will not be allowed to draw his Money out of Scotland, until that Way be taken.

May it therefore please your Lordships, to alter the Interlocutor complained of, and to find, that in respect of the Arrestment jurisdictionis fundandæ causæ, the Defender is amenable to the Courts of Scotland; or, 2do, If the Defender will not appear to object to the Accompt, though he is in Court, to allow the Petitioner to prove the Justice of it, and to give him the Aid of the Court in attaching the Money in Question for his Payment.

According to Justice, &c.



PAT. MURRAY.